Still No Bright-Line Rules on Spoliation Sanctions

Keith M. Brandofino and Ian M. Goldrich | All Articles
New York Law Journal | December 13, 2011

In 2010, federal courts in New York, Texas, and Maryland rendered well-publicized decisions on the proper factors to consider on a motion for sanctions based on spoliation of electronically stored information. Two issues predominated in each case -- culpability and prejudice. In the first decision, ***Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities***,[FOOTNOTE 1] the court in the Southern District of New York held that sufficiently culpable conduct was enough to warrant severe, even case-dispositive, sanctions irrespective of whether the innocent parties demonstrated that the loss of such ESI was prejudicial.

The subsequent decisions, ***Rimkus Consulting Group Inc. v. Cammarata***,[FOOTNOTE 2] and, perhaps more so, ***Victor Stanley Inc. v. Creative Pipe Inc.***,[FOOTNOTE 3] seemed to de-emphasize culpability; focusing instead on the alleged relevance of the spoliated ESI and the resulting prejudice to both the innocent party's case and the truth-finding process. Since these decisions, several federal district courts have weighed in on the proper analysis for ESI spoliation motions with differing results but some trends are emerging.

This article briefly summarizes the three 2010 decisions referenced above with particular emphasis on how those courts analyzed the issues of culpability and prejudice and the relative weight allocated to each such issue in fashioning spoliation sanctions. The article then examines several 2011 decisions to determine whether, and to what extent, federal courts have followed these decisions in considering spoliation motions. Finally, given the uncertainty that remains with respect to ESI spoliation law, the article concludes with recommendations for establishing and maintaining defensible litigation holds, which remain critical in avoiding potentially case-dispositive spoliation sanctions.

THREE RULINGS

Judge Shira Scheindlin's decision in *Pension Committee* was notable for several reasons, not least among them was her apparent willingness to impose bright-line rules for ESI preservation -- something federal courts had been reluctant to do in the past. Culpability was the primary issue in *Pension Committee*. To determine appropriate sanctions for the failure to preserve potentially relevant ESI, Scheindlin referenced a continuum of culpability ranging from simple negligence, to gross negligence to willful misconduct. While simple negligence might warrant modest sanctions, such as additional discovery or some fee shifting, if the ESI lost was relevant -- gross negligence and willful misconduct establish sufficient culpability to justify harsh and potentially case-dispositive sanctions (e.g., adverse inference instructions, striking of pleadings, default judgments) in and of itself. For example, Scheindlin notably opined that the failure to issue a written litigation hold at the outset of litigation constituted per se gross negligence that could well warrant severe sanctions irrespective of actual prejudice to the innocent party.

In cases of willful or grossly negligent destruction of ESI, the *Pension Committee* decision shifts the burden to the spoliating party by establishing a rebuttable presumption that the evidence destroyed was relevant and its destruction prejudiced the innocent party. Another way to view *Pension Committee* is as an inversion of Federal Rule of Civil Procedure 37(e)'s safe harbor provisions. Whereas Rule 37(e) precludes sanctions for the failure to produce ESI destroyed as a result of the routine, good

faith operation of an electronic information system, *Pension Committee* practically requires the imposition of severe sanctions for the destruction of ESI as a result of bad faith or gross negligence -- irrespective of actual prejudice to the innocent party.

Barely one month after the *Pension Committee* decision, Judge Lee Rosenthal of the U.S. District Court for the Southern District of Texas addressed similar issues in the *Rimkus* decision, a case between an employer and former employees concerning allegations of trade secret misappropriation and breaches of non-compete and non-solicitation agreements. While agreeing with Scheindlin's holding on the need for a prompt, full and written litigation hold, Rosenthal's opinion eschews "bright-line distinctions between acceptable and unacceptable conduct in preserving information."[FOOTNOTE 4] The law requires that preservation efforts be reasonable, which, the court held, is determined by whether such efforts were "proportional to that case and consistent with clearly established applicable standards."[FOOTNOTE 5]

Rosenthal also departed from *Pension Committee* on the issues of culpability and prejudice. Citing 5th Circuit precedent, Rosenthal held that spoliation merits severe sanctions only upon a showing of bad faith; gross negligence is insufficient. Rosenthal also rejected *Pension Committee*'s rebuttable presumption that the evidence destroyed was relevant, and therefore its destruction prejudicial to the innocent party's case. Rather, Rosenthal held that establishing both relevance and prejudice was "an important check on spoliation allegations and sanctions motions."[FOOTNOTE 6]

In September 2010, Magistrate Judge Paul Grimm of the U.S. District Court for the District of Maryland imposed severe sanctions in *Victor Stanley II*, including a default judgment, shifting of attorney's fees and court costs, and an order of civil contempt against an individual defendant in response to egregious spoliation of evidence. Grimm construed the obligation to preserve evidence as a duty owed to the court and the justice system, rather than to an adversarial party. This subtle distinction led Grimm to question implicitly the reliance in *Pension Committee* and *Rimkus* on the degree of culpability in determining appropriate sanctions. For example, intentional spoliation that leads to no prejudice, because the evidence destroyed was irrelevant or cumulative, may not warrant severe sanctions --despite the magnitude of culpability -- because the impact on the case is limited. In contrast, mere negligent failure to preserve evidence may still warrant dispositive sanctions if such spoliation effectively eliminates an adverse party's ability to prove its case. In both cases, Grimm's focus is on prejudice to the truth-seeking process rather than prejudice to a particular party.

IS THERE A STANDARD?

In an analysis of more recent spoliation decisions, one trend is evident: The federal courts favor case-by-case analyses over bright-line rules. To the extent *Pension Committee* established rigid requirements for written litigation holds and rebuttable presumptions of relevance and prejudice in the face of willful or grossly negligent spoliation of ESI, courts have been reluctant to follow them. For example, Southern District of New York Magistrate Judges James C. Francis in ***Orbit One Commc'ns Inc. v. Rosen***,[FOOTNOTE 7] and Gabriel Gorenstein in ***Centrifugal Force Inc. v. Softnet Commc'ns Inc.***,[FOOTNOTE 8] held that, for small organizations, written litigation holds may be both unnecessary and counterproductive since such writings are usually general in nature whereas oral instructions may be better tailored to a few individual custodians.

In ***Steuben Foods Inc. v. Country Gourmet Foods, LLC***, Magistrate Judge Leslie G. Foschio of the Western District of New York was quite direct, holding that "the requirement of a litigation hold notice, as stated in the *Pension Committee* case, as a ground to presume or infer loss of relevant documents, has not been adopted in this district."[FOOTNOTE 9]

In another divergence from *Pension Committee*, but consistent with *Victor Stanley II*, Francis held that severe sanctions, such as an adverse inference instruction, must be tied to a loss of relevant materials and corresponding prejudice to the innocent party, not simply to the spoliating party's culpable conduct. The court acknowledged that there are indeed instances in which the spoliating party's conduct is so egregious that the destruction warrants an adverse inference. "Rather than declaring that the failure to adopt good preservation practices is categorically sanctionable, [however,] the better approach is to consider such conduct as one factor, and consider the imposition of sanctions only if some discovery-relevant data has been destroyed."[FOOTNOTE 10]

Recent federal court spoliation decisions repeatedly require a threshold demonstration of prejudice in the face of culpable conduct that very likely would have warranted a rebuttable presumption of prejudice under *Pension Committee*. For example, in ***Appelbaum v. Networked Insights Inc.***,[FOOTNOTE 11] the plaintiff regularly used a data wiping utility, purportedly to delete his laptop's internet browsing files (cookies, history, etc.) for privacy reasons, that he failed to disable after litigation arose. Defendant's forensic expert examined the laptop and reported to the court that, in his opinion, the utility had been used to wipe more categories of information than the plaintiff contended. Despite the plaintiff's "glaring failure" to disable the utility after the duty to preserve evidence arose, the court refused to impose any sanction because the defendant had failed to make some showing that potentially relevant documents (rather than simply internet-related information) were deleted.

Again, in ***Cedar Rapids Lodge & Suites, LLC v. JFS Development Inc.***,[FOOTNOTE 12] the court in the Northern District of Iowa denied an application to sanction the defendant for spoliation despite substantial evidence that the defendant deleted ESI after litigation commenced. Even upon a showing of bad faith, the court required the plaintiff to show actual prejudice before a spoliation sanction would be warranted. Similarly, in ***AMG Nat'l Trust Bank v. Ries***,[FOOTNOTE 13] the evidence strongly suggested that the defendant's "purpose in deleting the files was to prevent their discovery."[FOOTNOTE 14] Still, the court tabled consideration of a spoliation inference at trial pending a forensic determination of the evidence destroyed and the resulting prejudice to the plaintiff.

There is also some divergence among the circuits with respect to the level of culpability required to warrant case-dispositive sanctions. The 5th and 8th Circuits, for example, require a showing of bad faith or intentional misconduct; negligence of any degree is insufficient.[FOOTNOTE 15] In the 2nd Circuit, though, negligent destruction of ESI can result in an adverse inference instruction if that is the only way to restore the evidentiary balance. Thus, in ***Essenter v. Cumberland Farms Inc.***,[FOOTNOTE 16] the court in the Northern District of New York granted the plaintiff an adverse inference instruction that the evidence negligently destroyed -- video depicting the time before, during and after the plaintiff's injury -- would be unfavorable to the defendant. "[T]he inference is adverse to the party responsible for destroying the evidence not because of the party's moral culpability, but instead because of the risk that the evidence would have been detrimental to the party responsible for its loss."[FOOTNOTE 17]

DEFENSIBLE LITIGATION HOLDS

The federal courts' reluctance to establish bright-line rules for complying with parties' ESI preservation obligations can be both a blessing and a curse. On the one hand, case-by-case analyses give courts flexibility to consider many factors, including culpability, prejudice, and the reasonableness of the preservation efforts in light of the nature of the case and the amount at issue. Parties generally are not subject to draconian sanctions based on the mere failure to abide by one or more arbitrary requirements. On the other hand, reasonable and defensible preservation protocols implemented in one case may be deemed insufficient in another.

For in-house counsel struggling to balance the proper (some might say excessive and unrealistic) preservation of ESI potentially relevant to a pending or threatened action with the need to control ever expanding electronic discovery costs, the case law still leaves many questions unanswered. Indeed, as we have seen, the uncertainty exists on both an inter- and intra-circuit level. One of the best ways to avoid the risks attendant with such uncertainty is to implement and maintain a defensible litigation hold.

We recommend, first, that parties continue to issue written litigation holds to key witnesses with knowledge of the facts underlying the relevant dispute and to information technology personnel. Though courts have pushed back against Scheindlin's bright-line rule that the failure to issue a written litigation hold constitutes gross negligence, the bottom line is that there is very little to gain from tempting fate on this issue. Written litigation holds are much easier to defend than oral communications among employees, which are subject to the vagaries of the human memory.

In-house counsel who rely on oral litigation holds may also put at risk privileged communications. Should the need arise to defend a party's ESI preservation efforts, oral litigation holds may force a party into the unenviable position of having to disclose privileged conversations with in-house and perhaps outside counsel, rather than merely disclosing a written hold memorandum. In the end, the potential increased legal and technical costs from even non-dispositive sanctions, such as an order requiring a party to restore backup tapes, outweigh any potential reward from forgoing this fairly ministerial act.

The scope of the litigation hold should be broad, both in terms of custodians and media (i.e., backup tapes, text messages, voicemails, etc.), and err on the side of preservation. It is important to remember that preservation and production are two very different things, and a broad litigation hold need not ipso facto lead to higher electronic discovery costs. The scope of the litigation hold does not, and indeed should not, establish the scope of ESI required to be searched or produced. The scope of both is an issue for negotiation between the parties and, if necessary, judicial resolution. Properly implementing and maintaining a litigation hold often leads to cost savings by avoiding costly and distracting "discovery about discovery" and motion practice.

Finally, courts and commentators often focus on implementing a litigation hold -- emphasizing the need to locate the repositories of potentially relevant ESI and cease all document destruction policies -- and rightly so as these are important aspects of a proper litigation hold. Maintaining the litigation hold, however, can be just as important to avoid potential spoliation. In-house counsel should send periodic reminders to all recipients of the initial hold memorandum that the hold remains active.

Procedures should be in place to preserve the ESI of any departing or newly identified key witnesses. If new technology rollouts will replace existing media, IT personnel should coordinate with counsel to ensure that relevant data will not disappear with the outgoing technology. Until uniform rules, or at least clearer guidance from the courts, clarify litigating parties' ESI preservation obligations, the litigation hold remains one of the most potent weapons for ensuring that cases are decided on their merits rather than on motions for sanctions.

::::FOOTNOTES::::

FN1 685 F.Supp.2d 456 (S.D.N.Y. 2010).

FN2 688 F.Supp.2d 598 (S.D. Tex. 2010).

FN3 269 F.R.D. 497 (D. Md. 2010).

FN4 *Rimkus*, 688 F.Supp.2d at 613.

FN5 Id.

FN6 Id. at. 616.

FN7 271 F.R.D. 429 (S.D.N.Y. 2010).

FN8 783 F.Supp.2d at 736 (S.D.N.Y. 2011).

FN9 08 Civ. 561, 2011 WL 1549450, at *5 (W.D.N.Y. April 21, 2011) ("[defendant] points to no 2nd Circuit caselaw holding that a litigation hold must be in writing to avoid sanctions based on spoliation"). See also *Surowiec v. Capital Title Agency Inc.*, Civ 09-2153, 2011 WL 1671925, at *7 (D. Ariz. May 4, 2011) ("[t]he Court disagrees with *Pension Committee's* holding that a failure to issue a litigation hold constitutes gross negligence per se. Per se rules are too inflexible for this factually complex area of the law where a wide variety of circumstances may lead to spoliation accusations").

FN10 271 F.R.D. at 441 (citations omitted).

FN11 10 Civ. 50, 2011 WL 286125, at *11-13 (W.D. Wisc. Jan. 27, 2011).

FN12 C09-0175, 2011 WL 4499259, at *9-10 (N.D. Iowa Sept. 27, 2011).

FN13 06 Civ. 4337, 09 Civ. 3061, 2011 WL 3099629, at *5 (E.D. Pa. Jul. 22, 2011).

FN14 Id.

FN15 See *Gaalla v. Citizens Medical Ctr.*, No. V-10-14; 2011 WL 2115670, at *1 (S.D. Tex. May 27, 2011); Cedar Rapids, 2011 WL 4499259, at *8 ("a spoliation sanction requires a finding that a party intentionally destroyed evidence with a desire to suppress the truth") (citations omitted).

FN16 1:09 Civ. 0539, 2011 WL 124505, at *6-7 (N.D.N.Y. Jan. 14, 2011).

FN17 Id. at *7.

Keith M. Brandofino is a partner, and Ian M. Goldrich an associate, at Kilpatrick Townsend & Stockton in the New York office.